

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|---------------------|---|---------------------------------|
| JERMAINE I. HOWARD, | § | |
| | § | No. 593, 2008 |
| Defendant Below, | § | |
| Appellant, | § | Court Below—Superior Court |
| | § | of the State of Delaware in and |
| v. | § | for New Castle County |
| | § | |
| STATE OF DELAWARE, | § | |
| | § | |
| Plaintiff Below, | § | Cr. ID No. 0604009582 |
| Appellee. | § | |

Submitted: March 13, 2009

Decided: June 11, 2009

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

ORDER

This 11th day of June 2009, upon consideration of the brief and motion to withdraw filed by the appellant's counsel ("Counsel") pursuant to Supreme Court Rule 26(c) ("Rule 26(c)") and the State's response, it appears to the Court that:

(1) In October 2008, Wilmington Police Detective Randy Pfaff received two anonymous tips that a suspect was selling crack cocaine in the area of Third and Rodney Streets in Wilmington. Based on the tips, Pfaff opened an undercover investigation and, as part of the investigation, called a cell phone number that was provided by the tipsters. The person who

answered the cell phone agreed to sell Pfaff \$100 worth of crack cocaine and instructed Pfaff to meet him at the intersection of Third and Rodney Streets.

(2) Pfaff responded to the intersection of Third and Rodney Streets as instructed. Once there, he observed a lone suspect walking northbound on the west side of the 300 block of Rodney Street. The suspect appeared to be looking for something. Pfaff then received a cell phone call. The caller was the person Pfaff had spoken to earlier. The caller advised Pfaff that he was in the area of Third and Rodney Streets but couldn't find Pfaff. Pfaff described his vehicle and exact location for the caller. Within moments, the suspect was observed approaching Pfaff's vehicle and was stopped by police officers who were providing surveillance.

(3) The suspect, Howard, was found to be in possession of a cell phone. The cell phone's number was the same as the number provided by the tipsters, and the phone's call history reflected Pfaff's earlier call to the suspect. The cell phone's call history also contained Howard's mother's phone number.

(4) Pfaff advised Hank DuPont of Probation and Parole of the incident involving Howard, a Level III probationer.¹ DuPont obtained

¹ In 2006, Howard was tried and convicted on drug and traffic offenses and one count of endangering the welfare of a child. He was sentenced to a total of five years at Level V

supervisory approval to search Howard's motel room. DuPont found two empty look-a-like container safes, *i.e.*, a fake shaving cream canister with a removable bottom and a fake wall outlet with a removable front.

(5) Following an evidentiary hearing, the Superior Court adjudged Howard guilty of violation of probation (VOP). The Superior Court found that Howard had used a cell phone in an attempt to set up a drug deal, and that the empty containers in Howard's motel room were drug paraphernalia. The Superior Court sentenced Howard to two years and six months. This appeal followed.

(6) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold. First, the Court must be satisfied that Counsel has made a conscientious examination of the record and the law for claims that could arguably support the appeal.² Second, the Court must conduct its own review of the record and determine whether the appeal is so devoid of at least arguably appealable issues that it can be decided without an adversary presentation.³

suspended after six months for Level III probation. On direct appeal, this Court affirmed the Superior Court's judgment. *Howard v. State*, 2007 WL 2310001 (Del. Supr.).

² *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

³ *Id.*

(7) Counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Counsel informed Howard of the provisions of Rule 26(c) and provided him with a copy of the motion to withdraw and the accompanying brief and appendix. Counsel also informed Howard of his right to supplement the brief and to respond to the motion.

(8) In his written submission, Howard claims that, under this Court's decision in *LeGrande v. State*, the anonymous tips received by Pfaff provided an insufficient basis for police to stop him and for DuPont to search his motel room.⁴ Howard did not raise this claim at the VOP hearing. As a result, we review the claim for plain error, *i.e.*, error that is apparent on the face of the record.⁵

(9) Howard's reliance on *LeGrande v. State* is misplaced. In *LeGrande v. State*, this Court held that the information gleaned from an anonymous tip was insufficient to establish probable cause to search the defendant's apartment because there was no corroboration by independent police work of the tipster's assertion of illegality.⁶ In Howard's case, however, Pfaff conducted an independent investigation into the tipsters'

⁴ *LeGrande v. State*, 947 A.2d 1103 (Del. 2008).

⁵ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁶ *LeGrande v. State*, 947 A.2d 1103, 1105 (Del. 2008).

assertion that a suspect was selling drugs in the area of Third and Rodney Streets. Pfaff's investigation yielded evidence that the suspect, Howard, was attempting to make a drug sale and provided reasonable suspicion to stop Howard and search his motel room.

(10) The Court has reviewed the record carefully and has concluded that Howard's appeal is wholly without merit and devoid of any arguably appealable issue. We are satisfied that Counsel made a conscientious effort to examine the record and properly determined that Howard could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice